No. 14522.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES *ex rel.* ALEJANDRO RACA ALCANTRA,

Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service,

Appellee.

On Appeal From the United States District Court for the Western District of Washington, Northern Division.
Honorable John C. Bowen, Judge.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

I.

The Legislative History and Judicial Interpretation of Section 212(d)(7) Precludes Its Application to Mainland-Resident Aliens, Such as Appellant, Returning From a Business Sojourn to Alaska.

Appellee contends that Alaska was converted by Section 212(d)(7) of the Immigration Act of 1952[1] into a "foreign place," and that therefore, when appellant left that

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[1]Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U. S. C. 1182(d)(7), hereinafter referred to as "the Act," or the "Act of 1952."

territory, he "departed a foreign port." *A priori,* according to appellee, appellant's return to his home in the United States was, for immigration purposes, a new entry, and hence, appellant is excludable.

Although the Government's argument is elegantly fitted in crusty nautical metaphor, unhappily the premises upon which it is anchored proceeds from a misunderstanding of the legislative history, Congressional intent and judicial interpretation of Section 212(d)(7), and its predecessor.

For many years, migration to American possessions, particularly Hawaii, was encouraged as a matter of official policy.[2] Immigration laws and their enforcement in those areas were relaxed as a measure of migratory inducement. It soon became apparent, however, that no sooner had the alien gained lawful admission to the Islands than he would use this device as a means of entering the mainland.[3] To forestall this evasion of Congressional intent, this Court,

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[2]Senate Report 1515, 81st Cong., 2d Sess., at p. 671.

[3]*Savoretti v. Voiler,* 214 F. 2d 425, 428.

With respect to the 1917 Immigration Act, predecessor to the 1952 Act (which modifies the 1917 Act, by merely adding Alaska to insular possessions), the following is noteworthy:

On March 19, 1914, the Secretary of Labor, W. B. Wilson, suggested an amendment to H. R. 6060, which later became the 1917 Immigration Act. As originally drafted, Section 2 of the 1917 Act did not contain the words "or any insular possession of the United States" (following the words Canal Zone). This addition was suggested by the Secretary of Labor with the following comment (S. Doc. 451, 63d Cong., 2d Sess.):

> "The coming of aliens coastwise to the mainland from the insular possessions—particularly of Asiatic aliens from the Philippine Islands—has become a matter of grave concern. It is believed that the simple change in the law here suggested would provide a remedy as under the law so amended, the insular possessions could not be used as a stepping-stone to the mainland by aliens of classes whose entry to the mainland would be regarded by all as undesirable, but whose admission to the

in *Healy v. Backus,* 221 Fed. 358, devised the so-called conditional entry theory. That case involved the right of the Immigration Commissioner to "adopt rules for an alien's admission to the insular possessions, and then require further examination, if he proceeded to the mainland, as a test for his right to enter the continent." (P. 363.) Holding in the affirmative, this court reasoned that:

> "aliens (might) be likely to become public charges on the mainland when such would not be the case with them were they to remain in the insular possessions . . ." (P. 363.)

Subsequently, in its 1917 Immigration Act,[4] Congress incorporated the rationale espoused in *Healy v. Backus* (see Footnote 3). Alaska, however, was regarded as the Continental United States rather than, like Hawaii, as an insular possession. (Appellee's Br. p. 15.) Its inclusion within Section 212(d)(7) of the Act, therefore, appears to have been intended as a sop to Hawaiian delegates who

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Philippines, for instance, might not be considered inadmissible by the authorities in charge of the enforcement of the Immigration laws in those Islands."

The suggestion of the Secretary of Labor was approved, for the following appears in Senate Report 355, 63rd Congress, 2d Session:

> "On page 2, line 3, following the words 'the Canal Zone,' insert 'or any insular possession of the United States, *so as to make it perfectly clear that the admission of an alien to the insular possessions does not privilege such aliens to come to the mainland without examination.* The necessity for the provision is the fact that aliens are using the insular territory (particularly the Philippines and Hawaii) as 'stepping-stones' to the continent. (See letter of Secretary of Labor, S. Doc. 451, pp. 3-4.)" (Italics supplied.)

[4]For the convenience of the court, the pertinent provisions of Section 1 of the Immigration Act of 1917, and its counterpart in the Immigration and Nationality Act of 1952, Section 212(d)(7), are set out in comparative form in the appendix.

protested that the proposed act discriminated against aliens *residing permanently in* Hawaii.

Nowhere is this more clear that in the colloquy between Delegate Farrington of Hawaii, and Representative Walter, co-author of the 1952 Act. A careful reading of this debate (cited in Appellee's Br. at pp. 17-19) reveals that Farrington and Walter were *not* discussing *mainland-resident* aliens, but rather aliens residing in Hawaii who were attempting to gain admission here. Indeed, Farrington was not interested in aliens who lived on the Continent. And Representative Walter appears to have been only concerned about aliens "who have never been properly screened." (98 Cong. Rec. 4406.) Moreover, Congressman Walter's reply to Delegate Farrington was merely a reiteration of the rule in *Healy v. Backus, supra.*

It is equally obvious, from the report accompanying the final version of the bill,[5] that Congress had no motive for including Alaska other than to equate that territory with Hawaii in the context of *Healy v. Backus,* for at page 14 the report reads:

> "Section 212(d)(7) of the bill continues in effect the *special procedures* applicable to aliens who travel from the land zone, territories, or outlying possessions to the Continental United States or any other territory under the jurisdiction of the United States. Under the bill *such procedures* will also be applicable to aliens traveling from Alaska to Continental United States." (Italics supplied.)[6]

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[5]S. Rep. 1137, 82d Cong., 2d Sess.

[6]H. Rep. 1365, 82d Cong., 2d Sess., p. 53, is substantially in accord.

What *special procedure* is Congress alluding to? Manifestly, the practice summed up in S. Rep. 1515,[7] at p. 658:

> "Generally aliens who have been lawfully admitted to any of our insular possessions (except the Canal Zone) are not admissible to the continental United States (which includes Alaska for control purposes) or any other territory subject to the jurisdiction of the United States, unless such aliens can satisfy the Immigration and Naturalization Service that they are not inadmissible under the exclusionary provisions of the Act of 1917. Such aliens are thus considered as proceeding from a foreign area to the United States as far as immigration provisions of the Act of 1917 are concerned. . . . *Alien residents of the continental United States are not subject to the exclusionary provisions of the Act of 1917 when traveling from the continental United States to any of our insular possessions and return.*" (Italics supplied.)

This interpretation was attacked by the Government as without "support in any statute administrative construction, or decision, and appears to be erroneous" (Appellee's Br. p. 24, Footnote 10).[8] Nevertheless, the report makes

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[7]In the late forties, the Senate appropriated $335,000 for a "full and complete investigation of our entire immigration service." The Immigration Service cooperated fully, and the committee received, among other things, memoranda from various immigration officers regarding their practice and procedure (S. Rep. 1515, 81st Cong., 2d Sess., pp. 1-3). The result of this project was the massive, 925 page Senate Report 1515 now being cited.

[8]Be that as it may, the report nonetheless reflects Congressional opinion as to what the law and practice was prior to the 1952 Act. It was *this* impression that Congress believed was "continued in effect" by Section 212(d)(7) of the Act. See: S. Rep. 1137, 82d Cong., 2d Sess., p. 14, and H. Rep. 1365, 82d Cong., 2d Sess., p. 53. It was *this* thought also which prompted Representative

further reference to these "special procedures" at page 660:

> "An alien resident of the United States, who visits Hawaii and wishes to return to the mainland, is issued a form which shows the port and date of original arrival in the United States, *and the claimed status.* He is not required to present a passport or visa when traveling between the continental United States and any outlying insular possession of the United States or when traveling from one insular possession to another."[9]

Walter, co-author of the Act, to in effect remark in debate in defense of this provision that permanent residents of the United States "can come to the mainland." See: App. Op. Br. p. 22.

The administrative decision, *Matter of O'D,* 3 I. & N. Dec. 632, is correctly cited by appellee as a contrary interpretation. Yet, this interpretation does not mitigate the significance of the Congressional version for it appears to have been adopted only after a lapse of 32 years from passage of the 1917 Act, and moreover, the decision apparently was not communicated to the Senate Committee when it was investigating all phases of immigration practice (see: footnote 7, *supra*), nor apparently, to the President's Commission on Immigration and Naturalization (see footnotes 10 and 11, *supra*). Certainly no mention of it is made in any of the reports regarding the 1952 Immigration Act.

It is interesting to note also, that in the Government's brief in *Brownell v. Rubinstein,* October Term, 1953, No. 300, a different attitude to S. Rep. 1515 is displayed. It is there stated:

> "In the comprehensive 1950 Report of the Senate Committee on the Judiciary (Senate Report 1515, 81st Cong., 2nd Sess.) entitled 'the Immigration and Naturalization System of the United States' and *which embodies the congressional understanding of existing law upon which the 1952 Act was predicated,* it was stated . . ." (Italics supplied.) (Pet. Br. p. 35; see also, pp. 8, 19 and 33.)

[9]The report cites former 8 C. F. R. 176-202(g), 12 F. R. 9987, 9988, regarding local documents. Similar, although not identical, provisions appear in 8 C. F. R. 211.2(c), 17 F. R. 11483.

It is noteworthy, too, that the President's Commission on Immigration and Naturalization[10] at no point suggests that the 1952 Act was meant to apply to the mainland-resident aliens visiting Hawaii or Alaska. Rather, in fact, the Commission thought, like Congress, that the 1952 Immigration Act:

> "continued this policy and *extended it to Alaska,* which was not previously included," (Commission Report, at p. 183),

and that:

> "This discrimination against the *inhabitants of the possessions* of the United States seem to be unsound." (Commission Report, p. 184.)[11]

Not only, then, is there *no* explicit statement anywhere in the debates or Committee reports equating mainland-resident aliens to those living on our territories and possessions, but the Congressional discussion, and indeed, the very Government officials responsible for the enforcement of the Immigration program, support the view of Senate Report 1515 (p. 658) that Section 212(d)(7) of the Act does not apply to aliens residing on the mainland.

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[10]A Commission was appointed by the President on September 4, 1952, pursuant to Executive Order 10392 to study and report on the immigration and naturalization laws and policies of the United States. Its findings and recommendations are contained in the 319 page report entitled: *Whom We Shall Welcome*, from which the next two quotations cited in the main brief are taken.

[11]In this connection, it is interesting to observe that some of the seven members constituting the Commission are or were intimately associated with the enforcement of the 1917 Act and the 1952 Act. For example, Thomas G. Finucane is Chairman of the Board of Immigration Appeals; Earl G. Harrison is a former Immigration Commissioner; Philip B. Perlman, former Solicitor General; and Adrian S. Fisher was formerly counsel to the Secretary of State.

Appellee seeks to root the third peduncle of its argument in the judicial concept of "entry." Appellee contends that whenever an alien leaves the United States, he has no vested right to re-enter, and some cases are cited purporting to support this proposition. But notably, these authorities deal either with aliens entering the United States for the first time,[12] or with aliens returning to the United States from a visit abroad—*i.e.*,[13] from a place outside the (statutorily defined) United States. (*Cf. Claussen v. Day,* 279 U. S. 398, 401.)

The "original entry" (or "conditional entry") cases cited in Footnote 12, *supra,* simply effectuate the express legislative policy of obviating the use of American possessions by aliens as "stepping stones" toward gaining lawful admission to the mainland. (See: *Savoretti v. Voiler,* 214 F. 2d 425, 428.) Alien residents of American possessions and territories making their initial entry into the Continental United States must first undergo a pre-entry screening. On the other hand, the so-called "re-entry" cases, cited in Footnote 13, *supra,* have dealt exclusively with aliens departing from the United States for foreign countries (usually their homeland), and seeking thereafter to

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[12]*Karamoto v. Burnett,* 68 F. 2d 278; *Matsuda v. Burnett,* 68 F. 2d 272.

[13]*The Chinese Exclusion Case,* 130 U. S. 581; *Lem Moon Sing v. United States,* 158 U. S. 538; *Lapina v. Williams,* 232 U. S. 78; *Lewis v. Frick,* 233 U. S. 291; *Claussen v. Day,* 279 U. S. 398; *Polymeris v. Truedell,* 284 U. S. 279; *Stapf v. Corsi,* 287 U. S. 129; *Volpe v. Smith,* 289 U. S. 422; *Shaughnessy v. Mezei,* 345 U. S. 206; *Sugimoto v. Nagle,* 38 F. 2d 307; *Schlimmgen v. Jordan,* 164 F. 2d 633; *Schoeps v. Carmichael,* 177 F. 2d 391. *Note:* Cases such as *Fong Yue Ting v. United States,* 149 U. S. 698, and *Kaloudis v. Shaughnessy,* 180 F. 2d 489, go to the questions of the power of Congress to exclude or expel aliens rather than attempting to interpret or define the term "entry."

return here. Neither of these situations is up for consideration now. Indeed, on the few occasions when the instant question has been submitted for judicial determination, the courts have held, with but one (distinguishable) exception,[14] that alien residents returning from an American possession have *not* made an "entry."[15]

But, even if the appellee is correct in his contention generally, the courts of this circuit have carved out a significant and pertinent exception. In those instances where the alien's occupation carries him without the boundaries of the Continental United States, his return to the mainland while in pursuit of that employment has invariably been regarded as *not* an entry within the meaning of the deportation and exclusion laws. (*Weedin v. Okada* (C. C. A. 9), 2 F. 2d 321; *Petition of Hersvik* (D. C. S. D. Cal.), 1 F. 2d 449; *Ex parte Nagata* (D. C. S. D. Cal.), 11 F. 2d 178; *Ex parte Saito* (D. C. W. D. Wash.), 18 F. 2d 116.) Moreover, this view has apparently been accepted by the Supreme Court (*Chew v. Colding,* 344 U. S. 590), as well as by the Fifth Circuit (*Savoretti v. Voiler,* 214 F. 2d 425), and the District Court for the District of Columbia (*Taran v. Brownell,* No. 3494-53 (Nov. 24, 1954)).

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[14]*ILWU v. Boyd,* 111 Fed. Supp. 802; complaint ordered dismissed by the Supreme Court for failure to present a justiciable controversy (347 U. S. 222). *Note:* This case was heard by a three-judge District Court, but none of the legislative history of Section 212(d)(7) was presented to that court.

[15]*Savoretti v. Voiler* (C. C. A. 5), 214 F. 2d 425; *Taran v. Brownell* (D. C. D. C.), No. 3494-53 (Nov. 24, 1953). *Compare also: Delgadillo v. Carmichael,* 332 U. S. 388; *Kwong Hai Chew v. Colding,* 344 U. S. 590; *Carmichael v. Delaney,* 170 F. 2d 239; *DiPasquale v. Karmuth,* 158 F. 2d 878.

In any event, the courts seemingly have now called a halt to the "propagation of (the) extreme view"[16] at precisely the posture in which appellant's case is poised here. (*Savoretti v. Voiler* (C. C. A. 5), 214 F. 2d 425; *Taran v. Brownell* (D. C. D. C.), No. 3493-53 (Nov. 24, 1953).) Both of these cases involved mainland-resident aliens returning to the States after visits to Puerto Rico.[17] In both instances, the court was faced with a statutory construction problem almost identical to the one presented here.[18] The Government, of course, argued then (in the *Voiler* case, at least), as it does now, that the language of the Act ought to be given its ordinary, everyday sense (*Barber v. Gonzales,* 347 U. S. at 640); that the words "leave" and "come" (in the 1917 Act) should be construed as applicable to mainland-resident aliens journeying between the Continent and American territories.[19]

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[16]*Carmichael v. Delaney,* 170 F. 2d 239, 242.

[17]In both cases, the alien had been convicted of crimes involving moral turpitude, and was not otherwise deportable because his convictions post-dated his original entry by more than five years. (Immigration Act of 1917, Sec. 19.)

[18]See: *Appendix* for a comparative view of the two statutory sections herein involved. Additionally, Section 19 of the 1917 Act states that the deportation provisions of that section:

> "shall also apply to the cases of aliens who *come* to the mainland of the United States from *insular possessions thereof.* . . ."

It is readily seen that the critical terms "leave" and "come" or "enter" were of as much significance in those cases as they are in the instant one. Moreover, an examination of the briefs filed by appellee and appellant in the *Voiler* case reveals that both parties raised substantially the same points and the same issues as are here in controversy (the nationality point excepted), including the contention that the Congressional impression of the law is "erroneous." (Govt. Br. in *Voiler,* at pp. 8-9.)

[19]Government's Brief in *Savoretti v. Voiler, supra,* at pp. 7-13.

But both courts flatly rejected this interpretation, reasoning that *Voiler* and *Taran,* in traveling to Puerto Rico, by *definition* never left the United States, and therefore could not have entered the United States within the meaning of the Act.[20] See also: *Gonzales v. Williams,* 192 U. S. 1, at p. 16, holding that in traveling from Puerto Rico to the United States, "Gonzales was not a passenger from a foreign port . . .;" and, *Air Transportation Association of America v. Brownell,* 124 Fed. Supp. 909, where:

> "The Court is of the opinion that there is no basis for treating ports in Hawaii, Alaska and Puerto Rico as foreign ports. They are part of the United States of America." (P. 910.)

Yet, the very most that the Government can properly say about Section 212(d)(7), in light of an apparent conflict in its meaning, is that it is ambiguous and uncertain; its exact requirement is left in doubt.[20a] In such circumstances, deportation statutes deserve strict construction for "as a practical matter they may inflict the equivalent of banishment or exile!"[21] (*Barber v. Gonzales,* 347

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[20]Accord: *Weedin v. Okada* (C. C. A. 9), 2 F. 2d 321; *Petition of Hersvik* (D. C. S. D. Cal.), 1 F. 2d 449; *Ex parte Nagata* (D. C. S. D. Cal.), 11 F. 2d 178; *Ex parte Saito* (D. C. W. D. Wash.), 18 F. 2d 116.

[20a]Unfortunately, the 1952 Immigration Act lacks the preciseness that legislation should have. Professor Max Rheinstein of the Chicago University Law School contends that "it is an abomination on the English language * * * worse than the Code of Internal Revenue." Former Attorney General McGranery testified that the Act contained numerous ambiguities. *Hearings before the President's Commission on Immigration and Naturalization* (1952), pp. 774, 1350.

[21]The fact that this is an exclusion proceeding is immaterial since the effect is the same. (*Carmichael v. Delaney,* 170 F. 2d 239, 245.)

U. S. 637; *Galvan v. Press,* 347 U. S. 522; *Fong Haw Tan v. Phelan,* 333 U. S. 6; *Delgadillo v. Carmichael,* 332 U. S. 388.) Therefore, "in the absence of explicit language showing a contrary Congressional intent, we must give technical words in deportation statutes their usual-technical meaning." (*Barber v. Gonzales, supra,* at p. 643.)

As a matter of fact, this very court has shown no hesitancy in obviating harsh, punitive consequences ensuing from the kind of strained interpretation of "entry" as that advocated by the Government here. In *Gonzales v. Barber,* 207 F. 2d 398, at p. 402, this court "recognized the fact that (its) definition of the word 'entry' (was) not its plain and obvious meaning, but . . . also recognized that the word had become a word of art." This was also the construction adopted by the Supreme Court (*Barber v. Gonzales,* 347 U. S. 637);[22] and which was cited with approval by the Fifth Circuit in *Savoretti v. Voiler,* 214 F. 2d 425, Footnote 4.

Similarly, when this court, *in an exclusion proceeding,* was again confronted with the dual concept of "entry," it resolved the question in favor of the alien because:

> ". . . We are not disposed to believe that Congress intended so monstrous an application of the statute."

(*Carmichael v. Delaney,* 170 F. 2d 239, 243.)

That a more liberal approach to a law which "bristled with severities"[23] was welcomed by this court is apparent from Judge Healy's observation in the *Delaney* case that:

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[22]Rather than "reversed on other grounds" as indicated in appellee's brief at page 58.

[23]*Harisiades v. Shaughnessy,* 342 U. S. 580; *Sigurdson v. Landon,* 215 F. 2d 791, 798.

". . . in *Delgadillo v. Carmichael, supra,* the (Supreme) Court brought a needed measure of restraint into the interpretation of the law on the subject." (P. 242.)[24]

and from his comments regarding the alternative view, at p. 245:

"Throughout history banishment or exile has been looked upon as a penalty little less dreadful than death. To one in appellee's situation exclusion is in substance and practical effect the equivalent of banishment. It involves the same severance from home and existing ties that the individual suffers who is expelled from the country in a proceeding to deport. There is no difference in their loss of freedom of movement or in the nature of the hardships they are called upon to undergo. The sole distinction resides in the mere matter of nomenclature. The distinction, we think, is of no moment insofar as concern the Constitutional guaranty of due process of law."

Moreover, this same concern for the incongruities of the deportation laws seems to underlie the circuit's rationale in *Del Guerico v. Gabot,* 161 F. 2d 559, at 561, and in *Mangaoang v. Boyd,* 205 F. 2d 553 (both involving construction of the term "entry"), as it did in the 2nd Circuit opinion in *Di Pasquale v. Karnuth,* 158 F. 2d 878 (also an "entry" case).

But the manifest injustice resulting from accepting appellee's version of "entry" is primarily in its consequences to appellant. For the Government proposes to punish appellant simply for pursuing his occupation in Alaska, rather than in Oregon or California. This result is outrageous not only because it impugns to Congress a legis-

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[24]In fact, it would appear that this court felt constrained to render the holding it did in the *Delgadillo* case primarily, if not solely, because of precedent Supreme Court rulings.

lative purpose for which there is no evidentiary basis, but because it in fact flaunts an express Congressional definition of "United States" which specifically incorporates Alaska (Sec. 101(a)(38) of the Act)—a definition, by the way, upon which the appellant was entitled to rely in following his vocation to Alaska. (See: *Carmichael v. Delaney, supra; Savoretti v. Voiler, supra; Taran v. Brownell, supra.*)

Furthermore, "the right to work is the right to eat, to live in freedom, to hold property." (*Barsky v. Board of Regents,* 347 U. S. 442, 472 (dissenting opinion of Justice Douglas).) But, the "right to eat" should not be conditioned upon the nature of one's occupation. Yet, the Government is saying, *post facto,* that appellant is to be forever exiled not for a crime he may have committed (and for which he was already punished); not for taking a lark,[25] but for "being hungry."[26] Obviously Congress intended no such iniquity, and the courts will not tolerate it. The poignant language of Judge Learned Hand cries out for application here:

> ". . . Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment. It is well that we should be free and rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards." (*Di Pasquale v. Karnuth, supra,* at p. 879.)

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[25]Compare: *Di Pasquale v. Karnuth* (C. C. A. 2), 158 F. 2d 878; *Savoretti v. Voiler,* 214 F. 2d 425.

[26]Compare: *Kwong Hai Chew v. Colding,* 347 U. S. 590; *Takahashi v. Fish and Game Commission,* 334 U. S. 410; *Truax v. Raich,* 239 U. S. 33.

II.

Appellant Is a Citizen of the United States, or at Least a National Thereof, and Hence May Not Be Excluded or Deported.

Appellee has apparently misconceived the thrust of appellant's opening remarks respecting his status. Appellant is not content to rest his claim upon mere nationality, but contends that he derived United States citizenship from Article XIV, Section 1, of the Constitution which reads, in part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . ."

For the purpose of this Constitutional provision, the United States encompasses territory under the American Flag. (*De Lima v. Bidwell,* 182 U. S. 1; *Gonzales v. Williams,* 192 U. S. 1.) At the time of appellant's birth, the Philippines were American territory, and subject to the jurisdiction of the United States. (See: *Cabebe v. Acheson,* 183 F. 2d at 798, for historical references.) Therefore, aside from whatever nationality status Congress may have statutorily (albeit superfluously) conferred upon him, appellant was at all times herein a citizen of the United States, a standing which, it is respectfully submitted, Congress may not Constitutionally molest.[27] While the Government has sought to assimilate appellant's status to that of Filipinos in three preceding

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[27] *Terada v. Dulles,* 121 Fed. Supp. 6. This decision was appealed by the Government, but subsequently dropped and dismissed. See also: *Okimura v. Acheson,* 111 Fed. Supp. 303; *Murata v. Acheson,* 111 Fed. Supp. 306. (See Footnote 29, *infra,* for the judicial history of these two cases.)

cases,[28] it is significant that none of the appellants therein even *claimed* American citizenship. Thus, this Court did not have before it the question raised by this appellant, that is, whether Congress has the authority to divest appellant, of his United States citizenship without his express consent.

In the three Filipino cases just referred to, this Court held that a loss of *nationality* had taken place. To reach this conclusion, the court relied upon various acts of Congress from which it deduced a Congressional intention to denationalize Filipinos residing in the United States. In *Cabebe v. Acheson,* 183 F. 2d 795, the court found this inference necessary because:

> "There is no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the islands on the date of their independence." (P. 801.)

This same rationale was applied to the *Mangaoang v. Boyd,* 205 F. 2d 553, and *Gonzales v. Barber,* 207 F. 2d 398, cases. When, however, the Supreme Court granted certiorari in the *Gonzales* case (346 U. S. 914), it accepted unlimited jurisdiction. Although the Supreme Court found it unnecessary to reach the nationality issue, the importance of the court's readiness to pass upon the question cannot be overlooked. Especially is this true where the relationship involved here suggests an even closer affinity to this country—*i.e.,* citizenship.

What the Supreme Court had in mind when it accepted unlimited jurisdiction in the *Gonzales* case is obviously a

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[28]*Cabebe v. Acheson,* 183 F. 2d 795; *Mangaoang v. Boyd,* 205 F. 2d 553; *Gonzales v. Barber,* 207 F. 2d 398.

subject for only calculated speculation. But there is some authority which may be indicative of its attitude toward this issue.

In a not inapposite case, *Perkins v. Elg,* 307 U. S. 325, the Supreme Court said:

> "If the abrogation of the right (to elect nationality) had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity." (P. 337.)

In *Mandoli v. Acheson,* 344 U. S. 133, at p. 139, the court reiterated its view that:

> "the dignity of citizenship which the Constitution confers as a birthright upon every person born within its protection is not to be withdrawn or extinguished by the courts *except pursuant to a clear statutory mandate.*"

The Supreme Court's willingness to review the question may also have been in line with its practice (as well as this court's) of favoring construction of a statute which avoids forfeiture of residence. (*Fong Haw Tan v. Phelan,* 333 U. S. 6.) Of course, here, we are dealing not with mere deprivation of home, but of appellant's birthright—his United States citizenship.

Of utmost concern, however, is the contention of the Government here that it has the authority to divest its citizens and nationals of their heritage. If this is so, then consider the awesome result in light of *Harisiades v. Shaughnessy,* 342 U. S. 580, 587, 598, which acknowledges the power of the Congress to expel aliens for any reason or for none.

But if:

> "The power of naturalization vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away," (*United States v. Wong Kim Ark,* 169 U. S. 649, 703),

then it follows that Congress had "no power whatsoever to interfere with American citizenship by birth." (*Okimura v. Acheson,* 99 Fed. Supp. 587, 588, 111 Fed. Supp. 303; *Murata v. Acheson,* 99 Fed. Supp. 591, 111 Fed. Supp. 306;[29] nor with American nationality either. (*Cf. Perkins v. Elg,* 307 U. S. 325, 337.)

Moreover, a citizen, and presumably a national who also "owes permanent allegiance to the United States,"[30] may not conveniently repudiate their obligations of fealty to this country by expatriation. (*Kawakita v. United States,* 343 U. S. 717.) Citizenship is a two way street. (*Ainslee v. Martin,* 9 Mass. 454.) Expatriation requires the consent of both parties. (*Kawakita v. United States, supra; Dos Reis v. Nicolls,* 161 F. 2d at p. 862.)

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[29]In the *Okimura* and *Murata* cases, Judge McLaughlin of the District Court of Hawaii held subsections (c) and (e) of 8 U. S. C., Section 801, unconstitutional for the reasons aforementioned. Both decisions were appealed directly to the Supreme Court, which remanded them for "specific findings." (*Acheson v. Okimura,* 342 U. S. 899; *Acheson v. Murata,* 342 U. S. 900.) Upon remand, Judge McLaughlin made the findings directed, but again held the subsections invalid. (111 Fed. Supp. 303 and 306.) Although the Government again appealed, it subsequently dropped and dismissed the appeals, leaving the rationale of Judge McLaughlin's decisions in force.

[30]Section 101(a)(22) of the Act.

If, however, this Court finds the instant case indistinguishable from the *Cabebe* line of decisions, then appellant respectfully invites the court's consideration of the piquant language of Mr. Justice Frankfurter[31] accompanying his revocation of a former view:

> "Wisdom too often never comes, and so one ought not to reject it merely because it comes too late."

And the late Mr. Justice Jackson, in receding from a former position, concurred in *McGrath v. Kristensen,* 340 U. S. 162, at 178, with this conclusion:

> "If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all."

If the resulting deportation of *Gonzales,*[32] *Mangaoang*[33] and *Delaney*[34] could evoke such concern from this court because of the severity of the penalties thereby inflicted upon them, how much more should this Court be concerned when an implied construction is being used to deprive appellant not only of his residence, but of his heritage.

For these reasons, and in light of the aforementioned developments, it is respectfully urged that the court reconsider its position on this issue.

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[31]Dissenting in *Hensell v. United Planters National Bank & Co.,* 335 U. S. 595, at 600.

[32]*Gonzales v. Barber,* 207 F. 2d 398.

[33]*Mangaoang v. Boyd,* 205 F. 2d 553.

[34]*Carmichael v. Delaney,* 170 F. 2d 239.

Conclusion.

On the basis of the foregoing, it is respectfully submitted that the judgment of the court below should be reversed. Manifestly, if this court accepts appellant's argument in Part I of this brief, it may direct reversal without the necessity of reaching appellant's second argument, or reconsidering *Cabebe v. Acheson, supra.*

Respectfully submitted,

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APPENDIX.

The pertinent provisions of Section 212(d)(7) of the Immigration and Nationality Act of 1952, and its predecessor, Section 1 of the Immigration Act of 1917, read as follows:

§212(d)(7), Immigration Act of 1952	*§1, Immigration Act of 1917*
"The provisions of subsection(a) of this section, . . . shall be applicable to *any* alien who shall *leave* Hawaii, Alaska, Guam, Puerto Rico or the Virgin Islands of the United States, and who seeks to *enter* the Continental United States or any other place under the jurisdiction of the United States . . ."	". . . but if *any* alien shall *leave* the Canal Zone, or any insular possession of the United States, and attempt to *enter* any other place under the jurisdiction of the United States, nothing shall be construed in this Act as permitting him to *enter* under any other conditions than those applicable to *all* aliens."